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NO. 84-1824

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Appellants,

v.

TERRY C. KNAPP, Appellee,

Appeal From The United States Court Of Appeals For The Seventh Circuit

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APPELLANTS' BRIEF OPPOSING MOTION OF APPELLEE TERRY C. KNAPP TO DISMISS OR AFFIRM

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HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE respectfully submit this Brief opposing the motion of Appellee, Terry C. Knapp, to dismiss or affirm the appeal. Both the Jurisdictional Statement and the Motion to Dismiss or Affirm were organized

in three parts, each addressing one of the questions presented. That organization is followed here.

I.

SCHOOL DISTRICT BOARD POLICY 2111.10(11) IS A STATE STATUTE FOR PURPOSES OF 28 U.S.C. §1254(2), AND IT WAS RULED UNCONSTITUTIONAL BY BOTH LOWER COURTS.

Plaintiff-Appellee's motion to dismiss or affirm the appeal does not recite any authority supporting the view that the school board policy at issue is not a state statute for purposes of 28 U.S.C. §1254(2). The motion neither discusses nor distinguishes the prior precedents of this Court cited in the Jurisdictional Statement at note 2. Accordingly, the motion should be denied.

Plaintiff-Appellee characterizes School Board Policy 2111.10(11) as a "part of the superintendent's job description,"

and thereby attempts to diminish the significance afforded the policy. The existence of the policy properly legislated by the school district sitting in its capacity as a sovereign unit of local government in Illinois cannot be denied. Whatever plaintiff's characterization of that policy, it meets or exceeds the tests for "a state statute" under 28 U.S.C. §1254(2), giving rise to appellate jurisdiction in this Court. Moreover, this Court's language in the case of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 at 1693, n.14 (1983), indicated that an "announced office policy" was not a precondition to discipline, but that a preannounced rule would strengthen the employer's position.

Plaintiff's subsidiary argument that the school board policy is either vague or overbroad cannot stand in light of the Court of Appeals' own construction or

recognition that the defendants here placed a narrow interpretation on that policy such that its scope related only to personal grievances and not matters of genuine public interest and concern. The series of federal decisions in the cases of Adamian v. Jacobsen, 359 F.Supp. 825 (D.C.Nev. 1973), rev'd 523 F.2d 929 (CA 9, 1975), on remand aff'd 608 F.2d 1224 (CA 9, 1979), hold that it is error to construe a regulation of a unit of local government in the same fashion and with the same scrutiny as deciding a federal statute or regulation. At the very least, the construction of a state regulation requires a determination on facial validity only "on its meaning as authoritatively construed by a state court or agency." Because the school district here has narrowly interpreted the scope of the board policy at issue, that authoritative construction must be considered by federal

courts questioning its constitutionality. As the court in Adamian pointed out, the local construction must be given great deference as it is that unit which issued and enforced it. 523 F.2d at 932. The Adamian courts were considering a regulation not unlike the one involved here as it related to a teacher's alleged free speech rights and a challenge that the regulation was vague and constitutionally overbroad. The regulation there, read in conjunction with the standards of the American Association of University Professors, was not unconstitutional, and the Court denied the claim under Pickering v. Bd. of Ed., 391 U.S. 563 (1968).

Plaintiff has not argued the overbreath or vagueness of School Board Policy 2111.10(11) since the trial court ruled it unconstitutional on other grounds. The decisions of the lower courts here did not rest on vagueness or overbreath but rather

that any restraint, however justified or however minor, found in a chain of command policy was unconstitutional under the First Amendment. The argument made here does illuminate the refusal by the lower courts to give any deference to the regulation of a sovereign unit of local government, especially in light of the proper deference which should have been given under either the language of Connick v. Myers or the Adamian cases. This is evidenced by the lack of concern by both Courts as to whether plaintiff's speech was on private issues or matters of public concern. Although the trial court determined the speech was all on matters of public concern it stated its hesitancy to characterize some of the issues as anything but personal. The Court of Appeals expressly determined that two of the topics were solely matters of personal

interest but refused to remand for a new trial.

As these matters pertain to First Amendment rights, public employer's prerogatives, and responsibilities in dealing with employee grievances, they are of substantial concern and justify this appeal.

II.

PLAINTIFF-APPELLEE'S CLAIM THAT THERE IS AMPLE EVIDENTIARY SUPPORT IN THE RECORD TO SHOW THE LEGITIMATE REASONS OFFERED BY DEFENDANTS WERE PRETEXTUAL IS WITHOUT SUPPORT.

In Plaintiff-Appellee's motion there are twelve pages of material that plaintiff claims is ample evidentiary support for the jury's conclusions and that that evidence indicates defendants' reasons were pretextual. The matters and things set out on pages 30 through 42 are totally

conclusionary characterizations by the plaintiff without a single citation to witness testimony or evidence in the record.

As pointed out in the Jurisdictional Statement, the value-laden language used by the Court in its instructions and special interrogatories to the jury masked any true consideration by that jury under the doctrine of Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977). We contend the trial court prejudiced the jury: (1) by directing a verdict for plaintiff, (2) by indicating the court's determination that plaintiff's constitutional rights were violated, (3) by stating that plaintiff had participated in constitutionally protected speech. To ask that same jury if defendants would have taken the same action anyway was error and led to a biased resolution of the factual disputes.

Where federal courts by their instructions and tolerance of plaintiff's arguments permit the poisoning of jurors' minds as to the factors underlying the employment decision, the Mt. Healthy doctrine has not been met. Legitimate, independent reasons existed for the actions taken with regards to plaintiff but they were displaced by undue emphasis on alleged protected conduct, the Court's directed verdict instruction, and value-laden interrogatories. This was exacerbated because the trial court instructed the jury that all of plaintiff's conduct was protected. [The Court of Appeals expressly found that some of that conduct was not protected.]

In Connick v. Myers this Court determined that many of the elements Myers spoke of were solely personal matters and not of public concern. It reversed the lower courts and entered judgment for the

public employer rather than remanding for a further determination under Mt. Healthy as to which conduct, protected or unprotected, led to the employment decisions. Here, the case should have been remanded for a new trial to properly instruct and apply the Mt. Healthy doctrine to that conduct which the Court of Appeals determined to be protected. If plaintiff was reprimanded because of his speech on personal matters, then the defendants under the Mt. Healthy doctrine have an absolute right to a jury instruction indicating they are not liable for violation of the First Amendment.

III.

A VIOLATION OF DEFENDANTS' SEVENTH AMENDMENT RIGHTS IS A SUBSTANTIAL MATTER.

Much of plaintiff's thrust in the Motion to Dismiss or Affirm attacks defendants' "standing" to challenge the

remand in the nature of a remittitur by the Court of Appeals. There are no authorities cited in the motion for the proposition that defendants do not have standing. Plaintiff characterizes the remand as a "determination that a partial remittitur to a figure between $200,000 and $400,00 was appropriate since the jury did not have an opportunity to fully assess the impact of the equitable relief awarded by the district court" [Motion, p. 4]. That statement admits that the damage figure was in fact one for the jury to consider. And it admits that the jury did not have an opportunity to affix damages appropriately because they were not instructed as to the equitable relief awarded by the district court. The Seventh Amendment very plainly requires that the fact of damage is not to be resolved by the judge but rather by a jury fully informed of the evidence including

equitable relief to be awarded. Had a new trial on damages been ordered by the Court of Appeals or if it is ordered by this Court, the constitutional question under the Seventh Amendment would have been avoided. It is the only method of avoiding the constitutional question that does not lead to absurd results.

Plaintiff's argument regarding standing would lead to absurd results since the defendants, victimized by a verdict of either $514,000 or judge's order of $200,000 to $400,000, are injured in fact and denied a fair, fully informed jury evaluation of plaintiff's actual compensatory damages. This is particularly true since those figures are vastly in excess of all prior free speech teacher case awards that have been unreversed. Each of the cases cited by plaintiff in his motion are inapposite. The Alioto v. Cowles Communications, Inc., 430 F.Supp.

1363 (N.C.Cal. 1977), aff'd 623 F.2d 616 (CA 9, 1980), case is one involving libel. The Herrera v. Valentine, 653 F.2d 1220 (CA 8, 1981), case is one involving police brutality which caused the death of a stillborn child and the later death during trial of the plaintiff herself. The Moser v. Texas Trailer Corp., 623 F.2d 1006 (CA 5, 1980), case involved a personal injury, admiralty case and contributory negligence. We have set out in the margin the citations which were given to the Court of Appeals in our original comparative analysis which the Court of Appeals ignored in its decision.[1] Although we

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[1] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252, 101 S.Ct. 2748, 2752 (1981) [$72,910]; Flores v. Pierce, 617 F.2d 1386, 1392 (CA 9, 1980), cert. denied 449 U.S. 875 [$48,500]; Brule v. Southworth, 611 F.2d 406, 411 (CA 1, 1979) [$2,000]; Konczak v. Tyrrell, 603 F.2d 13, 17-18 (CA 7, 1979), cert. denied 444 U.S. 1016 [$12,500]; Cruz v. Beto, 603 F.2d 1178, 1186 (CA 5, 1979) [$10,291]; Simineo v. School Dist. No.

(Footnote Continued)

believe that comparative analysis should have been followed by the Court of Appeals in ruling that the jury's verdict was excessive, that analysis also stands in stark contrast to the cases cited to this Court by the plaintiff.

Plaintiff, who has never missed a day's pay as a teacher as a result of any action of the defendants, claims to be similarly situated to Mrs. Herrera, now deceased, who suffered great pain and agony from the assault in her ninth month of pregnancy, causing the death of her unborn child. Plaintiff claims to be comparable to Mayor Alioto who was smeared with an unfair linkage to the Mafia

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(Footnote Continued)
16, 594 F.2d 1353, 1357 (CA 10, 1979) [$60,000]; Stoddard v. School Dist. No. 1, 590 F.2d 829, 835 (CA 10, 1979) [$33,000]; Linn v. Garcia, 531 F.2d 855, 860 (CA 8, 1976) [$1,250]; Peacock v. Board of Regents, etc., 597 F.2d 163 (CA 9, 1979) [$470,005, reversed as excessive]; Hanson v. Shell Oil Co., 541 F.2d 1352 (CA 9, 1976); and Scagnelli v. Whiting, 554 F.Supp. 77 (M.D.N.C. 1982).

because, as a defense counsel and an officer of the court, he provided legal services to criminal defendants and was of Italian ancestry. Plaintiff claims similarity to Moser who fell two stories, suffered a skull fracture, numerous other fractures and broken bones, and over $350,000 in lost wages. The facts of these cases are not even remotely like those in the record below. Plaintiff's attempts to claim the precedent of Herrera, Alioto or Moser must fail because they are so dissimilar.

Finally, plaintiff claims that there is ample basis in the case below to fix a remittitur between $200,000 and $400,000; but there are no references to testimony, argument, or instructions to differentiate the jury's verdict. Plaintiff presents no formula or method that the district court could use to fix a proper judgment between $200,000 and $400,000 or indeed even to

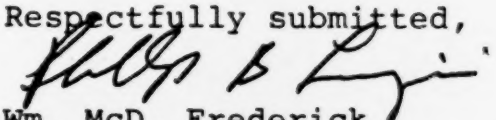
justify the bracket of $200,000 to $400,000. That is simply because one does not exist in the record. Had the jury differentiated its verdict such as $50,000 for loss of coaching, $50,000 for negative evaluations, $100,000 for loss of teaching at the high school level, $100,000 for damaged reputation in the community, and the balance for pain and suffering perhaps there would be a claim to excise only the objectionable amount dealing with reinstatement. There was no such computation at any time by any person involved in this trial. Therefore, any computation on this record is impossible. The only method of arriving at a non-erroneous verdict is a remand for a new trial.

CONCLUSION

For the reasons set out here and in the Jurisdictional Statement previously filed, the plaintiff's Motion to Dismiss

or Affirm should be denied. In the alternative, this Court should issue a writ of certiorari to consider the important questions and constitutional issues presented by the decisions below.

Respectfully submitted,



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